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No. 03-1622

In The Supreme Court Of The United States

MATTHEW FOUBERT,

Petitioner,

v.

CHERYL D. LYONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 11 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF AMICI INTEREST

This case concerns the scope of police-officer immunity in those situations in which the officer responds to a fellow officer's emergency call for assistance and, on arriving at the scene, uses force to subdue a suspect. More broadly, this case implicates how qualified immunity is evaluated as a general matter in excessive force cases. Here, a majority of the Sixth Circuit panel below denied Officer Foubert qualified immunity without even considering whether existing case law addressed the force he applied *in the context of receiving an emergency call for assistance from a fellow officer*. The deeply flawed approach of the lower court reflects an increasingly frequent error of the appellate courts concerning the particularity of facts in existing case law that would suffice to give an officer "fair warning" that his conduct may later be found to constitute excessive force.

Ohio and eleven other *amici* States, as guardians of public order within their respective jurisdictions, share an inherent interest in this issue. How courts evaluate claims of qualified immunity in excessive force cases will inevitably influence how effectively officers can investigate crime and preserve public order. On one hand, officer immunity is "qualified" rather than "absolute" precisely so that citizens can vindicate their legitimate right to be free of excessive force. This limit to immunity gives officers a proper incentive to respect a suspect's personal security. But on the other hand, if lower courts fail to apply with rigor the qualified immunity standards articulated by this Court, then the threat of litigation will chill a wide range of legitimate law-enforcement activity.

This case is a trenchant example. Officers who receive an emergency call from a fellow officer ought to be justified in expecting that the emergency circumstance will receive prominent attention when a court later considers

whether the officer is entitled to qualified immunity. Yet Officer Foubert was stripped of qualified immunity in this case without any reference to case law that could reasonably put Foubert on notice that any mistake he made in applying force somehow constituted an unreasonable mistake, given that he was responding to an emergency call for assistance from a fellow officer.

In *Saucier v. Katz*, 533 U.S. 194, 204 (2001), this Court specifically held that "[t]he inquiries for qualified immunity and excessive force remain distinct, even after *Graham* [*v. Connor*]." But the denial of qualified immunity in this case involved little more than repeating the basic finding that, on one version of the facts, Officer Foubert's actions were unreasonable. Moreover, the denial of qualified immunity in this case exemplifies a general and recurrent problem that is rooted in the misapplication of the standards for determining "clearly established law." To correct this erosion of an important principle of federal law, this Court should grant certiorari and reverse.

SUMMARY OF ARGUMENT

Ohio and the amici states urge the Court to grant certiorari on the first question presented. The States take no position on the second question in the petition, and we do not address it in this brief.

The first of the two questions presented merits a grant of certiorari because the decision below does not constitute an isolated error, but instead exemplifies a growing confusion of the lower courts in evaluating qualified immunity in excessive force cases. *Saucier v. Katz*, 533 U.S. 194 (2001) established that, when an officer asserts immunity, the courts must assess the immunity in two sequential steps. First, courts should decide whether a constitutional right would have been violated on the facts

alleged. If the answer is yes, courts must then proceed to decide whether that right was clearly established at the time of the incident. We will refer in this brief to the first step as the court's determining the existence of "constitutional violation" or "excessive force." We will refer to the second step as determining whether "clearly established law" put the officer on notice that his conduct was unlawful. It is the "clearly established law" determination that is at issue here.

Under *Saucier*, courts evaluating the typical excessive force case should find that prior cases meet the "clearly established law" standard only if the facts of those prior cases cannot be "distinguished in a fair way" from the present case. 533 U.S. at 202. The Sixth Circuit majority's decision in this case exemplifies two types of recurrent error in making that determination.

First, courts often fail, as the Sixth Circuit did here, to look for prior cases that address important aspects of the "totality of circumstances" that form the basis for the determination of excessive force. Since the standard for determining whether an officer used excessive force requires considering "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure," *Graham v. Connor*, 490 U.S. 386, 396 (1989), citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985), a trier of fact making that determination would be entitled to attach material significance to any of the totality of circumstances in a particular case. It follows that prior cases should be regarded as stating "clearly established" law in the present case only where the totality of circumstances presented in the current case parallel the particular facts of the prior case or cases.

In particular, when the linchpin of excessive force analysis lies, as it does in this case, in the officer's inferring a risk of harm that led to the use of force, courts ought to look

for prior cases where officers inferred a risk of harm under similar circumstances. But the Sixth Circuit failed to do so, and that error has been committed by other courts as well.

Second, courts determining the "clearly established law" issue suffer from the confusion that stems in part from a misapplication of *United States v. Lanier*, 520 U.S. 259 (1997) and, more recently, *Hope v. Pelzer*, 536 U.S. 730 (2002). While it is true that those cases acknowledge some situations where the law may be found to be clearly established even on factually dissimilar cases, that teaching should not control in a fact-specific excessive force case where an officer is summoned to the scene by an emergency call for assistance. Instead, qualified immunity in responding to an emergency call for assistance should only be pierced based on cases that show that an officer's inference of risk of harm to a fellow officer is unreasonable, or that a particular degree of force would be unreasonable given the inference of potential harm to the fellow officer.

REASONS FOR GRANTING THE WRIT

In this case, a fractured Sixth Circuit Court of Appeals[1] stripped Petitioner Officer Foubert of his qualified immunity by undertaking a dubious and confused analysis. As Judge Sutton's dissent pointed out, undisputed facts at the summary judgment stage showed that the force was applied in a context in which Officer Foubert received a "distressed call for backup help from a fellow officer." Then, when Officer Foubert responded to that emergency call, he entered

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[1] The opinion in this case was fractured in that Judge Sutton wrote for the majority on the excessive force claim involving the handcuffing of Respondent, while Judge Gibbons wrote for the majority on the claim involving the tackling (or "balance displacement") of Respondent. This latter claim is the one at issue here. Thus, any reference to the "Sixth Circuit" or the "court below" is to Judge Gibbons's opinion, unless expressly noted otherwise.

the house and "saw [the fellow officer] in close proximity to Lyons [on either version of the facts] and the two of them yelling at each other." Pet. App. 15a. Yet the panel majority denied qualified immunity without considering whether any prior cases put Officer Foubert on notice that he could not justifiably infer a risk of harm given these undisputed facts.

A. The Sixth Circuit's decision exemplifies the improper result of employing a segmented, overly restrictive view of the totality of circumstances when determining whether the exercise of force violated clearly established law.

As outlined in Petitioner's opening brief, the Sixth Circuit's decision below reflects a segmented, overly restrictive approach to applying *Saucier v. Katz*. *See* Pet. Br. at 11-15. *Saucier* prescribed the analysis that courts should use when considering an officer's claim of qualified immunity in an excessive force case, and set forth that analysis in terms of two sequential steps. The Sixth Circuit misstepped on both.

Under *Saucier*, courts should first determine the "threshold question" whether, "taken in the light most favorable to the party asserting the injury," the "facts alleged show the officer's conduct violated a constitutional right." 533 U.S. at 201. In excessive force cases, that inquiry involves judging "the reasonableness of the officer's belief as to the appropriate level of force . . . from [the officer's] on-scene perspective." *Id.* at 205, citing *Graham v. Connor*, 490 U.S. 386 (1989). That inquiry calls for "attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Saucier addressed the question whether the inquiry should end after this threshold question and proceed to a second step. *Saucier* firmly decided the answer was yes. Once a court has determined that a claim of excessive force is present, *Saucier* holds that an officer is stripped of immunity only if the constitutional right that was violated was "clearly established." *Saucier*, 533 U.S. at 201. And, according to *Saucier*, a right is clearly established only upon considering the conduct at issue and comparing it to a prior case finding a constitutional violation with "facts not distinguishable in a fair way" from the case at hand. *Id.* at 202. This standard reflects the underlying requirement that "before [officers] are subjected to suit, [they] are on notice their conduct is unlawful." *Id.* at 206.

In the context of a Fourth Amendment excessive force claim like this case, the constitutionality of the officer's actions is measured by a standard of reasonableness under the totality of the circumstances. *See Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (describing the test as "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure"); *see also Graham*, 490 U.S. at 396. It follows that, in any given excessive force case, the judge or jury might determine that some facts in the totality outweigh others in importance; but the totality defines the range and scope of consideration and, for the police officer going about his duties, the totality constitutes his basis for determining how to act in accordance with the Constitution.

In this case, however, the Sixth Circuit majority focused very narrowly on the precise scene Officer Foubert encountered after entering the house, without giving proper attention to the emergency call that led to his presence there. In doing so, the court failed to consider the undisputed facts showing that Foubert inferred a risk of harm based primarily on the emergency call. The Sixth Circuit's restricted view led to the holding that, on the plaintiff's version of the facts,

Officer Foubert acted unreasonably and used excessive force. The same restrictive view led to error when the court considered the issue of clearly established law.

When a court mistakenly focuses on just one segment of the totality of circumstances in determining excessive force, it is not surprising when that same court errs again in the same way in searching for clearly established law, by looking only to cases involving a small subset of all the facts in that totality. That surely occurred in the present case, where both the majority and the dissent sought—largely in vain—prior cases involving the tackling of a suspect at arrest. *See* Pet. App. 17a, 26a.

Yet this error differed from the court's step-one error in that the court's search for clearly established law was both over- and under-inclusive. The court focused too narrowly by looking solely for tackling cases. But more important, the court erred by not limiting its search to cases in which an officer had to decide the appropriate level of force *in responding to an emergency call*. Indeed, the central finding that guided the majority's analysis of reasonableness lay not in the precise nature of the force applied, but in Officer Foubert's inference that a risk of harm to his fellow officer justified *any* physical action to subdue Lyons:

> I disagree that Officer Foubert had cause to be concerned for Officer Keith's safety under Lyons's version of events and, therefore, believe summary judgment for Officer Foubert is inappropriate.

Pet. App. 24a. Given that the majority's excessive force analysis turned on the inference of a risk of harm, the inquiry

into "clearly established law" should have involved finding cases where officers acted on the basis of emergency calls to a remote location.[2]

Nor is the Sixth Circuit is the only court led astray by segmenting the totality of circumstances in which an officer acted. The Second Circuit similarly truncated the "clearly established law" test in *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756 (2nd Cir. 2003). In *Cowan*, Officer Breen became embroiled in difficult circumstances when he legitimately stopped a car after he observed erratic driving. The car was registered to a man with a criminal record. Neither the driver nor his passenger, Cooper, could produce a license. A search of the driver yielded a substance resembling narcotics, at which point the driver bolted and headed for the nearby woods. Officer Breen's pursuit on foot proved fruitless. When he returned to his vehicle, he found that Cooper had meanwhile moved from the passenger seat to the driver's seat, and Cooper was driving in Breen's

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[2] In one case cited below, *Smith v. Ball State University*, 295 F.3d 763 (7th Cir. 2002), an officer at the scene did call for assistance from other officers, but the force was applied by another officer who appeared later on the scene and used force based primarily on what he witnessed at the scene. In any event, the court found qualified immunity in that case. It appears that few cases address the emergency call situation. One case issued after the incident in this case properly takes account, in assessing the reasonableness of an officer's use of deadly force, of information that an officer derived from a 911 call. *Milstead v. Kibler*, 243 F.3d 157, 160, 163 (4th Cir. 2001) (911 caller stated intruder into home had shot man in the neck and stabbed a woman, and those facts were considered in granting qualified immunity). Another post-incident case permits officers summoned to a scene by a call for backup to rely on the backup call to justify their actions at the scene. *Flowers v Fiore*, 359 F.3d 24, 34 (1st Cir. 2004). Of course, the relative dearth of emergency-backup-call cases ought to militate in Officer Foubert's favor. The paucity of cases shows that no clearly established law put Officer Foubert on notice that he could not properly infer a risk of harm justifying force in the present case.

direction. Breen tried to flag the car to stop, but it would not. Fearing for his safety, he fired two shots. The second shot killed Cooper.

The Second Circuit found that certain factual disputes precluded a finding that Officer Breen had not used excessive force, and it also denied qualified immunity, based or its finding that the law was somehow clearly established. Much as in the case presented here, the Second Circuit foreshortened its consideration of qualified immunity by referring back to the very issue that required trial to determine excessive force—the issue whether the officer reasonably believed that the driver posed a significant threat of death or serious physical harm to the officer or others at the time the officer fired his gun. Just as in the present case, the Second Circuit conducted no search for case law that would show that an officer ought not to fear harm after experiencing an entire sequence of events similar to those that Officer Breen had undergone. Instead, the court contented itself with simply reiterating the need for jury trial on whether Officer Breen had used excessive force.

Thus, *Cowan* commits the same error as the Sixth Circuit majority here. That is, an overly segmented analysis of the facts led to an inadequate determination of whether clearly established law put the officer on notice that he was violating the Constitution. Indeed, segmenting in this manner led to the court's failure to identify the most relevant cases (or lack thereof), *i.e.*, cases in which an officer inferred a risk of harm from an entire sequence of events leading up the the use of force. The Court should grant certiorari and clarify that, when determining whether clearly established law put an officer on notice that his use of force would be excessive, courts should look for cases that address all important aspects of the totality of circumstances that faced the officer—especially the officer's experiencing the sequence of events leading up to the use of force.

B. The Sixth Circuit's error here reflects the lower courts' confusion in construing and applying *Hope v. Pelzer*, 536 U.S. 730 (2002). *Hope* is inapposite in excessive force cases like the present one, because of (1) the emergency circumstances in which the force is used and (2) the existence of undisputed facts supporting an inference that Foubert's fellow officer was at risk of being harmed.

As explained above, under *Saucier*, an officer is stripped of immunity only if the constitutional right that was violated was "clearly established," *Saucier*, 533 U.S. at 201, a standard that is met when there are cases presenting "facts not distinguishable in a fair way" from the present case. 533 U.S. at 202. The trouble, in this case and for the courts of appeals generally, has been understanding the meaning of "facts not distinguishable in a fair way." In other words, how factually similar must a prior case be in order to constitute "clearly established" law that puts the officer on notice that he could be held liable?

Part of the confusion below stems from the developing jurisprudence that recognizes that the "fair warning" standard does not "point[ ] to a single level of specificity in every instance." *Hope v. Pelzer*, 536 U.S. 730, 740 (2002), citing *United States v. Lanier*, 520 U.S. 259, 270-71 (1997). It appears that *Hope* is exercising a tidal influence on cases like the present one, inducing courts in some instances to relax the degree of particularity they require in reviewing prior excessive-force cases. *See Haugen v. Brosseau*, 351 F.3d 372, 391 (9th Cir. 2003), cert. petition

pending, *Brosseau v. Haugen*, Case No. 03-1261;[3] *Cowan*, 352 F.3d at 761. That is wrong, because *Hope* and *Lanier* should not aaply to cases such as this one.

In *Lanier*, the Court faced the issue whether prior cases provided fair warning to a criminal defendant that his conduct could lead to criminal liability for violating the Constitution. The Court held that a "fair warning" standard that parallels the "clearly established law" test should apply in such criminal cases. To be sure, in the civil context as well, courts must sometimes decide whether a cause of action exists in a general sense, and that general determination will constitute an initial step in the qualified immunity analysis. In *Siegert v. Gilley*, 500 U.S. 226 (1991), the Court explained how an action could not violate a "clearly established" standard when the action is not even a "violation" of the law at all:

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of any constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.

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[3] Like the first question presented in this case, *Brosseau*'s second question challenges the Ninth Circuit's misapplication of the clearly established law standard in that case. If the Court grants certiorari as to the second question in *Brousseau* (No. 03-1261), then it should also grant certiorari here, or at a minimum, it should hold the petition in this case pending decision in *Brosseau*.

Id. at 232.

But by stark contrast with the situation in cases like *Lanier* and *Siegert*, cases such as *Tennessee v. Garner* and *Graham v. Connor* establish that the exercise of force in connection with an arrest can give rise, in a general sense, to a civil rights action based on alleged Fourth Amendment violations. Accordingly, the inquiry into whether an officer used excessive force in a case like the present focuses not on the general existence of a cause of action, as was the issue in *Lanier*, but rather the *presence of particular circumstances that create a legitimate issue of civil liability for decision by a judge or jury.* It follows that, in proceeding to *Saucier*'s next step and determining whether there was clearly established law, a court should look not simply for case law that states a general principle that would establish the existence of a cause of action overall. Instead, courts must seek cases of sufficiently similar particulars such that the officer would be "on notice" of a potential violation—on these particular facts—to begin with.

Nor should *Hope* itself be read to dictate a contrary result. In *Hope*, the Court clarified the degree of factual similarity that constitutes the law as "clearly established." In particular, the Court rejected the Eleventh Circuit's standard, which had required that previous cases must be "materially similar" to the case at bar in order to constitute the law as "clearly established." 536 U.S. at 739. But *Hope* unquestionably addressed qualified immunity in a context very different from the garden-variety, excessive force claim presented here. In particular, two closely related points of distinction show *Hope* to be completely inapposite.

First, *Hope* addressed a situation in which individual prison officials defended against an Eighth Amendment claim by invoking a "policy or practice of cuffing an inmate to a hitching post or similar stationary object for a period of

time that surpasses that necessary to quell a threat or restore order." 536 U.S. at 736. Whether prison officials should enjoy qualified immunity for applying a standard prison policy of using the hitching post, without regard to any particular need to do so, is simply a different issue from applying immunity in most arrest cases. In the arrest context, "police officers are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Saucier*, 533 U.S. at 205, citing *Graham*, 490 U.S. at 397. When officers respond to the developing exigencies of an arrest situation, courts should shred immunity based only upon "careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. In emergency-response cases, the critical fact is the emergency itself, so courts ought to look for *emergency* cases that the courts have already decided.

The second point of distinction lies in *Hope*'s reliance on the Court's finding that, on the specific facts of that case, "[a]ny safety concerns had long since abated by the time petitioner was handcuffed to the hitching post" and that the case involved "a clear lack of an emergency situation," 536 U.S. at 738. To be sure, officers in excessive force cases sometimes use force in contexts in which no harm exists, and in such cases no particular case law is necessary to show the law was "clearly established." *See Vinyard v. Wilson*, 311 F.3d 1340, 1350-51, 1355 (11th Cir. 2002) (applying "obvious clarity" standard derived in part from *Hope* in context where no facts at all pointed to any risk of harm at the time force was applied). Courts in such cases may well be justified in finding that more general principles apply with "obvious clarity."

That doctrine, however, surely does not extend to the present case, in which undisputed facts show that Officer Foubert received an emergency call for assistance and

inferred a risk of harm, so that he necessarily decided his approach from that moment forward in that emergency-response context. Where, as in this case, some undisputed facts support an officer's inference of a risk of harm, he should enjoy qualified immunity unless prior cases have rejected such an inference *on specific facts that cannot be fairly distinguished.*

In spite of the distinction between *Hope* and most excessive force cases, the broad sweep of *Hope*'s language has spawned confusion among the lower courts of appeal. *See Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine*, 38 Ga. L. Rev. 661, 690 (2004) (noting that "[a]fter *Hope v. Pelzer*, the Eleventh Circuit, as well as all other circuits, has been grappling with its standards of qualified immunity"). On one hand, most commentators and courts have treated *Hope* as a decision aimed solely at correcting a grievous error on those particular and egregious facts. *See Excerpts from the Practicing Law Institute's 18th Annual Section 1983 Civil Rights Litigation Program*, 19 Touro L. Rev. 625, 653 (2003) (Professor Blum noting that Hope provides "nothing new" and served only as a "distinct message to the Eleventh Circuit"). Accordingly, courts in some cases have largely ignored *Hope* in conducting their qualified immunity analyses. *See, e.g., Willingham v. Loughnan*, 321 F.3d 1299, 1300 (11th Cir. 2003) (finding that *Hope*, even though reversing the Eleventh Circuit itself, did not change the pre-existing law in that circuit, and that *Hope* is limited only to cases factually "like *Hope*").

On the other hand, some courts either mention *Hope* in connection with applying a relaxed standard of particularity, as did the Ninth Circuit did in *Haugen* [351 F.3d at 391] and the Second Circuit in *Cowan* [352 F.3d at 761], or else—without mentioning *Hope* by name—treat

qualified immunity after *Hope* as allowing a more relaxed standard, as the Sixth Circuit did in this case and as the Third Circuit appears to do in the tight-handcuff case *Kopec v. Tate*, 361 F.3d 772, 777-78 (3rd Cir. 2004).

As the petition aptly articulates the point, *Hope* appears to be encouraging a "*carte blanche* mode of analysis" under the second prong of *Saucier*. *See* Pet. at 15. For instance, the court here found that a case involving placing handcuffs too tightly on a suspect was so factually similar to tackling a suspect as to place Officer Foubert on notice that his tackle violated a clearly established constitutional right. *See* Pet App. 27a (holding that "[i]f overly tight handcuffs can constitute excessive force under certain circumstances, it is readily apparent to me that the more physically intrusive, combative, aggressive, and potentially harmful act of tackling can alone constitute excessive force in certain circumstances"). For an officer to extrapolate a prohibition against tackling from a prohibition against placing handcuffs too tightly on a suspect is asking too much. Officer Foubert was not given fair warning of the constitutionality of his conduct in this case.

While a proper understanding of *Saucier* and *Hope* allows both cases to peacefully co-exist, the lower courts have struggled to find that balance. Indeed, the subtleties of *Saucier* and *Hope* are such that at least one commentator has suggested that *Hope* and *Saucier* are at complete odds with one another. *See* Balch, *Is There Hope After Hope? Qualified Immunity In The Eleventh Circuit*, 54 Mercer L. Rev. 1305, 1312 (2003) (posing the question "[s]o what is a court of appeals to do in the face of seemingly conflicting decisions?"). If legal commentators are confused, the cases can surely not be regarded as providing clear instruction to police officers. For this reason, this Court should grant review in order to better harmonize *Hope* and *Saucier*. *Cf.*

Vinyard v. Wilson, 311 F.3d 1340, 1350-53 (11th Cir. 2002) (adopting a three-part model to harmonize *Saucier* and *Hope*).

Finally, the *carte blanche* approach to the "clearly established" test exacerbates the outcome brought about by the overly restrictive view of "totality of the circumstances" discussed above. Some courts, like the Sixth Circuit in this case and the Second Circuit in *Cowan*, are piercing immunity even when no prior case contains sufficiently similar facts to put the officer on notice that his conduct violates a constitutional right, and to the extent that they search for prior case law at all, they look only for facts that parallel a tightly segmented portion of the totality of circumstances presented to the officer.

This case marks the confluence of these two types of faulty analysis, and nothing shows the importance of correcting such general, recurrent errors better than observing that (1) the Sixth Circuit here denied Officer Foubert qualified immunity without consulting a single prior case where the use of force occurred because of an emergency call for assistance from a fellow officer, (2) the Second Circuit in *Cowan* denied Officer Breen qualified immunity without consulting any prior cases in which an officer applied deadly force while trying to halt a suspect from driving away under circumstances creating at least some apprehension of harm to the officer, and (3) the Ninth Circuit in *Haugen* denied Officer Brosseau qualified immunity, 351 F.3d at 391-93, without relying on any prior cases in which an officer was found to have used excessive force by firing a shot in circumstances where the officer might apprehend the danger of high-speed driving by the suspect unless the suspect were stopped. In this last situation, as noted by Judge Tallman and five other circuit judges who dissented from the denial of en banc, "Officer Brosseau's contemporaneous knowledge of

the facts would lead a reasonable officer to believe that Haugen, based on his desperate behavior, was dangerous to others," 351 F.3d at 375.

What the conjoined errors in these cases lead to is nothing less than the collapse of *Saucier*'s second "sequential step"—the "clearly established law" test—back into the first step. That is so because courts such as the Sixth Circuit in this case are doing little more than reiterating, when addressing the issue of clearly established law, the very same reasoning that they had already employed in determining that the force was excessive. Pet. App. 25a ("On the other hand, if Officer Keith and Lyons were only verbally arguing and Officer Foubert tackled Lyons to the ground, Officer Foubert's determination about the amount of force allowable by law under the circumstances would have been mistaken *and unreasonably so*." (emphasis added)). Such decisions do not legitimately apply *Saucier*; they effectively overrule it. *See Saucier*, 533 U.S. at 204 ("The inquiries for qualified immunity and excessive force ***remain distinct***, even after *Graham*." (emphasis added)).

CONCLUSION

For all of the above reasons, the Court should grant Officer Foubert's petition and reverse the Sixth Circuit's denial of qualified immunity.

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